आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE MS. SUCHITRA R. KAMBLE, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 124/Ind/2022
Assessment Year: 2017-18

Narendra Kumar Shantilal Jain HUF Prop. M/s Chandan Garments Khutal Mohite Complex, 2nd Floor, 27/36, Subhash Chowk, Rajwada Indore	**बनाम/Vs.**	Pr. CIT -1 Indore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AACHN 5568 E		
Assessee by	Shri Prakash Jain & Ms. Shreya Jain, ARs	
Revenue by	Shri P.K. Mishra, CIT-DR	
Date of Hearing	13.12.2022	
Date of Pronouncement	23.12.2022	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by revision-order dated 23.03.2022 passed by learned Pr. Commissioner of Income-Tax, Indore-1 **["Ld. PCIT"]** u/s 263 of Income-tax Act, 1961 **["the Act"]**, which in turn arises out of assessment-order dated 29.12.2019 passed by learned DCIT/ACIT-2(1), Indore **["Ld. AO"]** u/s 143(3)

for Assessment-Year **["AY"]** 2017-18, the assessee has filed this appeal on following grounds:

"1. That impugned order passed by the Ld. Pr. CIT, Indore-1 is bad in law, without jurisdiction, it is based on incorrect interpretation of law and without allowing proper and reasonable opportunity of being heard, moreover the facts have also been incorrectly construed.

2. That on the facts and circumstances of the case and in law, the Ld. Pr. CIT, Indore-1 failed to appreciate that there was no error or prejudice much less both, to warrant the innovation of the powers conferred u/s 263.

3. That on the facts and circumstances of the case and in law, and in any view of the matter, the ld. Pr. CIT, Indore-1 erred in holding that the impugned assessment order dated 29.12.2019 passed u/s 143(3) of the Income Tax Act 1961 to be erroneous and prejudicial to the interest of Revenue for complete lack of enquiry on the part of the Ld. Assessing officer on all the stated issues.

4. That on the facts and circumstances of the case and in law, the Ld. Pr. CIT, Indore-1 erred in initiating proceeding u/s 263 without appreciating the fact that the assessment order is passed by the Ld. AO after detailed scrutiny and raising specific queries and after satisfying with the reply and evidence filed by the assessee and so also case law relied by the assessee on the reasons for which proceeding u/s 263 is initiated.

5. That on the facts and in the circumstances of the case and in law the Ld. pr. CIT erred in holding that the Excess stock of Rs. 4,00,250/-, Excess Rs. 9,88,585/- and Unexplained money advanced Rs. 1,04,38,835/- is to be assessed u/s 69A and 69 respectively without appreciating the fact that all the above income falls under the head income from Business as no other source of income was found by the survey party except the manufacturing and trading of Readymade garments and clothes.

6. That on the facts and in the circumstances of the case and in law, the Ld. Pr. CIT failed to appreciate the fact that statement recorded under survey u/s 133A has not evidentiary value and during the course of assessment proceedings u/s 143(3) the assessee in reply to the queries raised by the ld. AO proved that Excess Stock of Rs. 4,00,250/-, Excess cash Rs. 9,88,585/- and Unexplained money advanced Rs. 1,04,38,835/- surrendered during the survey u/s 133A is earned out of business income and in support of its contention an affidavit was also filed and thereafter examining the reply of the assessee, evidence filed, case law relied and

considering the affidavit the Ld. AO assessed these income under the head income from business.

Without prejudice to the above:

7. That on the facts and in the circumstances of the case and in law the Ld. Pr. CIT failed to appreciate the fact that even if the income is assessed by applying the provision of section 115BBE even though there is no loss to the revenue as on the date of survey and so also on the first day of financial year 2016-17 the rate of tax u/s 115BBE was 30% plus cess @ 3% which is paid by the assessee and charged in assessment order passed u/s 143(3).”

2. Heard the learned Representatives of both sides at length and case records perused.

3. The assessee-HUF, engaged in carrying a business named and styled as “M/s Chandan Garments”, submitted return of income on 26.10.2017 declaring a total income of Rs. 1,20,77,550/-, which was subjected to scrutiny-proceeding and finally assessed by Ld. AO vide assessment-order dated 29.12.2019 at the returned income. Subsequently, Ld. PCIT examined the records of proceeding conducted by Ld. AO and found the assessment-order as erroneous-cum-prejudicial to the interest of revenue for the sole reason that a survey was conducted upon the assessee on 19.09.2016 on the basis of which the assessee admitted and declared income of Rs. 4,00,250/- on account of excess-stock, Rs. 9,88,585/- on account of excess-cash and Rs. 90,50,000/- on account of unexplained money-advanced (Rs. 1,04,38,835/- is wrongly mentioned in the revision-order as well as grounds of appeal, the correct figures as culled out from records is Rs. 90,50,000/- on account of unexplained advanced-money) but the assessee offered those income at normal tax and the Ld. AO too assessed at normal tax, although they were taxable u/s 69A / 69 of the act and consequently chargeable at a higher rate of tax u/s 115BBE. Finding this, Ld. PCIT initiated action u/s 263 of the Act through notice dated 03.03.2022.

4. In response to the notice, the assessee made a reply which is reproduced by Ld. PCIT in his order. Ld. PCIT considered the same but being unsatisfied, he passed revision-order setting aside the assessment-order and directing the Ld. AO to frame a *de novo* assessment.

5. Being aggrieved by revision-order, the assessee has now come in appeal before us.

6. Although the assessee has raised as many as seven grounds as cited earlier, the crux of the grounds can be fit in a narrow compass i.e. whether income relatable to the excess-stock of Rs. 4,00,250/-, excess-cash of Rs. 9,88,585/- and unexplained money-advanced of Rs. 90,50,000/- attracted section 115BBE or not; and consequently whether the revision-order passed by Ld. PCIT is valid or not?

7. Thus, the fundamental controversy between the parties is with regard to the application or non-application of section 115BBE and this controversy arises for the rival reasoning of both sides i.e. while the assessee claims the impugned excess-stock, excess-cash and unexplained money-advanced as part of business-income thereby not attracting section 69A / 69 read with section 115BBE of the act; the Ld. PCIT claims the same to have been earned from undisclosed sources thereby attracting section 69A / 69 read with section 115BBE of the act.

8. It is noteworthy that the impugned incomes have been admitted by assessee during the course of survey and also offered as such in the return of income, therefore the issue becomes simpler for us for the explicit reason that we need to focus to the statements made by assessee during survey-proceeding. Ld. DR carried us to the statements recorded during survey-proceeding, as re-produced by Ld. PCIT in the revision-order, and drew our

attention to the following questions raised by survey-team to the assessee and the replies given by assessee in response thereto:

"प्रश्न- व्यावसायिक प्रतिष्ठान जो कि खुशाल मोहिते सुभाष मार्ग राजवाड़ा पर अवस्थित है पर आज दिनांक सर्वेक्षण की कार्यवाही के दौरान आपके रूम (श्री नरेन्द्र जैन) की भौतिक सत्यापन पर कुल नकद रकम रूपए 12,66,683/- रूपए पाए जाने पाए गए उक्त रकम आपके द्वारा बताया गया है कि यह रकम चंदन गारमेंट से संबंधित है कृपया इसका स्त्रोत स्पष्ट करें ।

उत्तर- मैं आपको Chandan Garment prop. श्री नरेन्द्र कुमार शांतिलाल जैन HUF. की कैश बुक दिनांक 19/09/2016 को प्रस्तुत कर रहा हूँ जिसके अनुसार कैश का बैलेंस रुपये 2,78,103/- आ रहा है अंतर की राशि कुल रुपये 9,88,585/- (12,66,683 - 2,78,103) आ रहा है तथा इस अंतर की राशि को मैं स्पष्ट करने में असमर्थ हूँ अतः इस अंतर की का वर्तमान वित्त वर्ष 2016-17, कर निर्धारण वर्ष 2017-18 में अतिरिक्त स्त्रोतों से अर्जित आय मानते हुए नियमित आय के अलावा आयकर कराधान हेतु स्वेच्छा से समर्पित करता हूँ और राशि पर देय कर नियमानुसार भरने का वचन देता हूँ ।

प्रश्न- सर्वेक्षण की कार्यवाही के दौरान खुशाल मोहिते अवस्थित व्यवसायिक प्रतिष्ठान में आपके रूम (श्री नरेन्द्र जैन) के भौतिक सत्यापन के दौरान एक डायरी मिली है जिस को B1-1 के तौर पर नत्थी किया गया है उक्त डायरी आपको दिखाने जा रहा हूँ । इस डायरी का अवलोकन करने से पता चलता है कि विभिन्न दिनांकों को विभिन्न व्यक्तियों के आगे कुछ रकम भरना हुई है । कृपया इसे देखकर बताए कि उक्त रकम किससे संबंधित है ।

उत्तर - उपरोक्त डायरी में दर्ज लेनदेन मेरे concern नरेन्द्र कुमार शांतिलाल जैन HUF के द्वारा दिए गए ब्याजनुमा पैसे की विविध इंद्राज है जिसकी एंट्री हमारे नियमित लेखा पुस्तकों में नहीं है । उपरोक्त डायरी के पेज क्रमांक 1 से 7 लिखे हुए जिसके अनुसार कुल राशि विभिन्न दिनांकों को विभिन्न व्यक्तियों को कुल रूपए 90,50,000/- (अक्षरी नब्बे लाख पचास हजार) की राशि मेरे HUF के द्वारा ब्याजुना दी गई है उपरोक्त राशि रु. 90,50,000/- का स्त्रोत स्पष्ट करने में मैं असमर्थ हूं । अतः उपरोक्त राशि रु. 90,50,000/- को चालू वित्त वर्ष 2016-17, कर निर्धारण वर्ष 2017-18 की अतिरिक्त

आय मानते हुए नियमित आय के अलावा कराधान हेतु सुरक्षा से समर्पित करता हूँ और राशि पर देय कर नियमानुसार भरने का वचन देता हूँ ।

प्रश्न- कृपया यह स्पष्ट करें कि उपरोक्त बयाजुना राशि पर आप ब्याज किस दर से व कब प्राप्त करते हैं ।

उत्तर- उपरोक्त बयांजूना राशि HUF के द्वारा 12% प्रतिवर्ष की दर से दी जाती है तथा ब्याज पूर्व में ही राशि देते वक्त प्राप्त कर लिया जाता है । अतः ब्याज की राशि मेरे द्वारा किए गए घोषित आय कुल रुपए 90,50,000/- हजार में समाहित है ।

प्रश्न- आज दिनांक को की गई सर्वेक्षण कार्यवाही के दौरान M/s Chandan Garments जो कि आपके HUF की प्रोपराइटी कंसर्न है से संबंधित स्टाफ का भौतिक सत्यापन किया गया जिसकी इन्वेटरी मैं आपको दिखा रहा हूँ । इस इन्वेटरी के अनुसार उपलब्ध स्टॉक की कुल वेल्यू रु. 4,34,12,869/- है जबकि आपके द्वारा प्रस्तुत Trading Account के अनुसार स्टॉक की कुल राशि रु. 4,30,12,619/- आती है कृपया अंतर की राशि रु. 4,00,250/- को स्पष्ट करें ।

उत्तर - इस अंतर की राशि कुल रुपये 14,00,250/- को मैं स्पष्ट करने में असमर्थ हूँ । अतः राशि को मैं अपनी एचयूएफ की प्रापर्टी कंसर्न M/s Chandan Garment की अतिरिक्त आय के रूप में नियमित आय के अलावा चालू वित्त वर्ष 2016-17 कर निर्धारण वर्ष 2017-18 के लिए करारोपण हेतु घोषित करता हूँ तथा साथ में वचन देता हूँ कि इस राशि पर नियमानुसार देय कर जमा कर दूंगा ।"

Thus, in these statements, the assessee has categorically admitted twin-aspects, viz. (i) unable to explain the excess-cash / unexplained money / excess-stock; and (ii) the excess-cash / unexplained money / excess-stock is from "additional sources" or "undisclosed income". On a careful examination of statements, we nowhere find that the assessee has whispered any voice that the impugned incomes were earned from business. In fact, this is the precise reason that the Ld. PCIT has also made following conclusion and passed revision-order:

"4.1 Thus, it is clear from the aforesaid statement that the surrender on account of excess cash. Unexplained money advanced as well as excess stock has been made out of unexplained sources which was never disclosed to the department. Also the cash advanced are to be treated as undisclosed investment. Nowhere the assessee submitted that this suppressed income is out of business income. Not only that it has also been clearly stated in the statement that no pressure etc. was applied for recording his statement. Therefore, the submission of the assessee that excess cash, unexplained cash advanced and excess stock are nothing but out of business income is factually incorrect and therefore, the same cannot be accepted."

9. Now we proceed to check whether the Statement of assessee fits in the clutches of section 69 / 69A or not.

Section 69

69. Where in the financial year immediately preceding the assessment year the assessee has made investments which ***are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments*** *or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.*

Section 69A

"69A. Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article ***is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewelry or other valuable article, or*** *the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewelry or other valuable article may be deemed to be the income of the assessee for such financial year."*

Thus, section 69 / 69A is applicable if three conditions are satisfied, viz. (i) the assessee has made investment / is found to be owner of money; (ii) such investment / money is not recorded in the books of account maintained for any source of income; and (iii) the assessee offers no explanation about the nature and source of investment / money. Reverting back to the Statement of

assessee, we observe that all three conditions are clearly satisfied, viz. (i) the assessee has made investment / is found to be owner of excess-stock, excess-cash and unexplained money-advanced; (ii) the investment / money was not recorded in the books of account of assessee; and (iii) the assessee has clearly admitted the twin-aspects as narrated earlier from which it is manifest that the assessee offered no explanation regarding nature and source thereof. Thus, it is quite clear that all ingredients of section 69 / 69A are satisfied.

10. At this stage, we also refer the decision of **Hon'ble Co-ordinate Bench of ITAT, Indore in Rajesh Kumar Bajaj ITA No. 16/Ind/2019, order dated 09.03.2020** where an identical controversy was decided as under:

> *"13. Let us examine the statement given by the assessee during the course of survey in reply to questions raised about the source of Excess stock, Excess cash and undisclosed sundry debtors.*
>
> *प्रश्न 3. आपके Concern M/s R.R.Textile Mills में सर्वेक्षण की कार्यवाही के दौरान आपके द्वारा प्रस्तुत cash book के अनुसार आज दिनांक को cash Balance रु. 17413.71 दिखाया गया है जबकि भौतिक सत्यापन पर नगदी रु. 9,77,450/- पाया गया है । इस प्रकार आपके Concern में रु. 9,60,036.29 अधिक पाया गया है । कृपया इस अंतर रु. 9,60,036/- के कारण को स्पष्ट करें ।*
>
> *उत्तर 3. मैं अंतर की राशि रु. 9,60,036/- को स्पष्ट करने में असमर्थ हूँ इसलिए मैं अंतर की राशि रु. 9,60,036/- को मेरी प्रोपराईटरशिप कन्सर्न M/s R.R.Textile Mills की नियमित आय के अलावा अतिरिक्त आय के रूप में वित्तीय वर्ष 2014-15 से संबंधित निर्धारण वर्ष 2015-16 के लिए अघोषित आय समर्पित (surrender) करता हूँ और उस पर देय आयकर का भुगतान करने का वचन देता हूँ ।*
>
> *प्रश्न 5. आपके Concern पर सर्वेक्षण कार्यवाही के दौरान 13-14 उद्योग नगर, बुरहानपुर पर M/s R.R.Textile Mills के प्रकरण में भौतिक सत्यापन के दौरान कुल स्टॉक रु. 1,03,95,983/- का पाया गया है जबकि आपकी नियमित लेखा-पुस्तकों के अनुसार M/s R.R.Textile Mills का स्टॉक राशि रु. 28,49,869/- दर्शाया गया है । इस*

प्रकार कुल रु. 75,46,114/- का स्टॉक अधिक पाया गया है । कृपया अधिक पाये गये स्टॉक की राशि रु. 75,46,114/- के स्त्रोत को स्पष्ट करें ।

उत्तर 5. महोदय, मैं M/s R.R.Textile Mills के प्रकरण में अधिक पाये गये स्टॉक रु. 75,46,114/-का स्त्रोत स्पष्ट करने में असमर्थ हूँ । अतः अंतर की राशि रु. 75,46,114/- को मेरी प्रोपराईटरशिप कन्सर्न M/s R.R.Textile Mills की नियमित आय के अलावा अतिरिक्त आय के रूप में वित्तीय वर्ष 2014-15 से संबंधित निर्धारण वर्ष 2015-16 के लिए अघोषित आय समर्पित (surrender) करता हूँ और उस पर देय आयकर का भुगतान करने का वचन देता हूँ ।

प्रश्न 6. मैं आपको BI-1 राजकमल ग्रुप की डायरी दिखा रहा हूँ जिसके कुल 1 से 25 पृष्ठ लिखित है जिसे Annexure-'B' में इंद्राज किया गया है जो आपके व्यवसायिक स्थल 13-14, उद्योग नगर, बुरहानपुर पर पायी गयी है । कृपया इस डायरी को देखकर बताये कि इसमे किस प्रकार के व्यवहार दर्ज है ? और क्या ये सभी व्यवहार आपकी नियमित लेखा-पुस्तकों में दर्ज है?

उत्तर 6. मैंने आपके द्वारा दी गई डायरी BI-1, राजकमल ग्रुप को अच्छी तरह से देख लिया है । इसमें अग्रिम की प्रविष्टियां दर्ज है, जिनका लेखा M/s R.R.Textile Mills की नियमित लेखा-पुस्तकों दर्ज नहीं है । मैं इन प्रविष्टियों के स्त्रोत को स्पष्ट करने में असमर्थ हूँ । अतः पृष्ठ क्रमांक 1 से 25 तक में दर्ज कुल अग्रिम की राशि रु. 7,75,000/- को मेरी प्रोपरायटरी कंसर्न M/s R.R.Textile Mills की नियमित आय के अलावा अतिरिक्त अघोषित आय मानते हुए करारोपण हेतु समर्पित करता हूँ और उस पर नियमानुसार आयकर का भुगतान करने का वचन देता हूँ ।

14. Now in order to know that whether the assessee has offered any explanation to the excess stock, excess cash or receivable from sundry parties, from perusal of the statements in the reply given by the assessee in Question No.3, 5 and 6 we find that assessee has categorically accepted that "he is unable to explain the source of excess cash, excess stock and unaccounted receivables". There is no other evidence brought on record by the assessee to show that some unaccounted purchases for the year or unaccounted sales or unrecorded sales happened during the year or details of the debtors which can show the nexus of the surrendered income as business income for the year under consideration."

11. We observe that the issue, facts and law involved in this decision are exactly same as of the present appeal before us. Therefore, this decision is directly applicable and we are bound to follow the same which is from ITAT, Indore itself. Respectfully following this, we do not find any fallacy in the conclusion taken by Ld. PCIT that the impugned incomes relatable to excess-stock and excess-cash clearly attract section 69 / 69A of the Act and consequently section 115BBE as well.

12. Ld. AR has placed reliance on certain decisions including the decision of Hon'ble Co-ordinate Bench of ITAT, Indore in Rakesh Khandelwal Vs. PCIT, ITA No. 204/Ind/2019 dated 29.01.2020 to canvas that (i) where the AO has adopted one of the permissible view, the assessment-order cannot be said to be erroneous; or (ii) where the AO has conducted enquiry during assessment-proceeding but not discussed the outcome in assessment-order, the PCIT cannot make revision u/s 263 to substitute his own view. We certainly agree with such views but the facts of present appeal are different and do not warrant application of those decisions for the very reason that the Ld. DR carried us to the assessment-order wherein the Ld. AO has made following reporting on the impugned issue:

> *"Survey u/s 133A had been carried out in the case on 19.09.2016. Unaccounted income of Rs. 1,04,38,835/- was disclosed during the survey on account of excess cash found of Rs. 9,88,585/-, excess-stock found of Rs. 4,00,250/- and money advanced of Rs. 90,50,000/- has been incorporated as taxable income by the assessee in the ITR filed besides its regular income for the year under consideration."*

We are in agreement with Ld. DR that the Ld. AO has simply stated that the assessee has incorporated the excess-cash, excess-stock and money-advanced in the ITR. Needless to mention that the function of assessing authority is not only of adjudicator but also of investigator. In the present case, it is quite apparent from assessment-order that the Ld. AO has not made requisite

enquiry to ascertain the nature and tax implications of the impugned incomes, he has simply shut the point by saying that the assessee has incorporated incomes in ITR. Therefore, the decisions relied upon by Ld. AR do not support the assessee's stand.

13. Having said so, we now turn to Ground No. 7 wherein the assessee raises an alternative claim that the present case of Assessment-Year 2017-18 relates to the Previous-Year 2016-17 and the rate of tax u/s 115BBE was 30%+3% Cess as on first day of the Previous-Year i.e. 01.04.2016, therefore the tax-rate of 30%+3% Cess shall apply to the present case and not the higher rate, hence the assessment-order does not cause prejudice to the interest of revenue. The reason of projecting such a claim by assessee is that the higher rate of tax was prescribed in section 115BBE through an amendment made vide Taxation Laws (Second Amendment) Act, 2016 and the said amendment received assent of the President of India on 15.12.2016 and therefore the amendment shall apply prospectively w.e.f. 15.12.2016 and not retrospectively. The assessee claims that survey in assessee's case was conducted on 19.09.2016 which is prior to 15.12.2016 and therefore the higher rate of tax is not applicable to it, the tax-rate of 30%+3% Cess as existing in section 115BBE as on 01.04.2016 shall apply. To resolve this controversy, a lengthy discussion on the scheme of Income-tax Act, 1961; particularly the framework of previous year, assessment-year, the parliamentary system of prescribing tax-rates, etc. is required; but we have the benefit of a direct decision rendered by **Hon'ble Kerala High Court in WA No. 984 of 2019 – Maruthi Babu Rao Jadav Vs. The Assistant Commissioner of Income-tax, Central, Circle, Kozhikode, dated 23.09.2020** in which the Hon'ble High Court has already analysed such framework at length and was pleased to decide that the higher rate of tax would apply to whole Previous-Year 2016-17 related to Assessment-Year 2017-18. The relevant paragraphs of the decision are reproduced below:

"The writ petition sought for a declaration that the amendments made by the Taxation Laws (Second Amendment) Act, 2016, to Section 115BBE of the Income Tax Act, 1961 enhancing the rate of income tax, for specified incomes which are unexplained, to 60% and the surcharge provided in the Finance Act, 2016 to 25% for income covered under Section 69A, to be prospective. The above referred enactments are herein after referred to as the '2nd Amendment Act', 'IT Act' and the 'Finance Act'. The 2nd Amendment Act was dated 15.12.2016 and the amendment to Section 115BBE was specified to be effective from 01.04.2017. The amendment enhancing the rate of tax was incorporated in the I T Act and that of surcharge in the Finance Act. On declaration, consequential relief is sought against Ext.P2 assessment order levying tax at the enhanced rate of 60% and surcharge @25% on the 'advance tax'. The learned Single Judge rejected the writ petition by a cryptic judgment relying on Commissioner of Income Tax v. S.A.Wahab.((1990) 182 ITR 464 (KER)).

2. The learned Counsel Sri.Vishnu S Arikkattil appearing for the appellant would contend that even going by the decision in Karimtharuvi Tea Estate ltd. v. State of Kerala (AIR (1966) SC 1385) an amendment made on the 1st day of April of any financial year would apply to the assessments of that year. That is, if an amendment is brought into force on 01.04.2017, as is the case here, it can only apply to the assessment made in 2018-2019 (Assessment Year) of the income accrued for the previous financial year; which is 2017-2018. The learned Counsel would seek to draw a distinction insofar as a modification of the rate as brought out in the Finance Act and a substantive provision altering accrued rights or creating new liabilities, on the 1st of April of an year. In the former, it could apply to the assessments of the previous year, made in that financial year, but a substantive amendment not relating to the rates, could only be applied to the assessments of that financial year and not of the previous year. Reliance is placed on the Constitution Bench decision of the Hon'ble Supreme Court in C.I.T Vs. Vatika Township Private Ltd. (2015) 1 SCC 1. The learned Counsel would also place before us a number of decisions of the Hon'ble Supreme Court in Kesoram Industries v. Commissioner of Wealth Tax, [AIR 1966 SC 1385], Guffic Chem P. Ltd v. C.I.T [2011(4) SCC 245], C.I.T v. Sarkar Builders [(2015) 375 ITR 392 (SC)], Shiv Raj Gupta v. C.I.T [(2020) 425 ITR 420(SC)] and State of Kerala v. Alex George [(2004) 271 ITR 290(SC), to further buttress his arguments. Reliance is also placed on the Full Bench decision of the Patna High Court in Loknath Goenka v. C.I.T [2019 417 ITR 521(Patna)].

11. Before we look at the amendments carried out, on facts, there were two seizures of cash made on 02.08.2016 and 03.11.2016 respectively of Rs.1,05,03,500/- and Rs.1,24,68,750/- both in the F.Y 2016-2017. The persons from whom the cash was seized as also the appellant herein admitted that it belonged to the appellant who carries on trading in gold bullion. The appellant not having produced any books of accounts or cash flow statements failed to establish the source of the money seized; which was included in the total income under Section 69A of the IT Act. The writ petition or the appeal does not challenge such inclusion. On the said amounts tax was imposed @60% under Section 115BBE and surcharge @25%. The amendments to the Finance Act were by the

2nd Amendment Act dated 15.12.2016. The enhancement of tax under Section 115BBE was made effective only from 01.04.2017; the commencement of the assessment year 2017-2018, in which the assessments of the previous year are carried out.

12. The assessee contends that the seizures were made prior to the amendment. The affidavits admitting the ownership of amounts seized were also submitted prior to the amendment. The assessee was not aware of the enhanced tax liability when the admissions were made before the authorities. The assessee has also made an attempt to relate the amendments to the demonetization of the specified currencies announced on 08.11.2016 which contention we reject at the outset. The subject amendments which are relevant for our consideration have no direct link with the demonetization introduced or the taxation and investment regime of Pradhaan Mantri Garib Kalyan Yojana 2016 brought in under Chapter IX A of the 2nd amendment Act. The 2nd amendment Act as is clear from the Statements of Objects and Reasons, was to curb, evasion of tax and black money as also plug loopholes in the IT Act and to ensure that defaulting assessees are subjected to higher tax and stringent penalty provision. Both the measures spoken of herein were to further the said objects and there cannot be any nexus assumed nor is it discernible.

13. Section 115BBE was inserted by Finance Act 2012 w.e.f 01.04.2013. As on 01.04.2016 the financial year in which the subject seizures occurred Section 155BBE provided for 30% tax on income referred to in Sections 68, 69, 69A, 69B, 69C and 69D. The same was amended by the 2nd Amendment Act; w.e.f. 01.04.2017, enhancing the rate to 60%. Hence there was no new liability created and the rate of tax merely stood enhanced which is applicable to the assessments carried on in that year. The enhanced rate applies from the commencement of the assessment year, which relates to the previous financial year.

14. Likewise it was by Chapter II with heading 'Rates of Income Tax', as provided in the Finance Act 2016, that a surcharge was introduced by way of the 3rd proviso of Section 2(9) of that Finance Act. This comes into effect from the Financial Year 2016-2017; which is the year in which the subject seizures were occasioned. The proviso refers to various provisions where the advanced tax computed under the first proviso stands increased by a surcharge for the purpose of the Union. Section 115BBE is one of the provisions referred to in the 3rd proviso and in the case of individuals the surcharge was @15% where the total income exceeds one crore, as on 01.04.2016. By the 2nd Amendment Act Section 2 of the Finance Act, 2016 stood amended by which 115BBE was omitted from the 3rd proviso. After the 6th proviso yet another proviso was inserted which provided for the 'advance tax' computed under the first proviso, in respect of any income chargeable to tax under Section 115BBE(1)(i), to be increased by a surcharge for the purposes of the Union, calculated @25%. Hence there is no new liability of surcharge created and it is a mere enhancement of the rate of surcharge.

15. In the financial year 2016-17 itself the tax as provided under section 115BBE and the surcharge on advance tax was available as discernible from the IT Act and Finance Act, 2016 as it stood on 1.4.2016 itself. A major misdemeanor leading to assessment of income as accrued under Section 69A invites the consequences of Section 115BBE and surcharge provided under Section 2(9) of the Finance Act, 2016. When it stands enhanced from 01.04.2017, for every assessment carried out in that year, related to the previous year, the rates as applicable on 01.04.2017 has to be applied. There being no new liability created or obligation imposed, the arguments raised by the appellant's counsel fails. The appellant cannot have a contention that he committed the misconduct on the expectation that if he were caught he would have to shell out only lesser amounts as tax and surcharge. There is no right accrued on the assessee to commit an offence on the expectation of a lesser penalty.

16. It was also argued that Income Tax at the rate or rates specified, as prescribed in any Central Act to be charged for any assessment year, shall be so charged in respect of the total income of the previous year as per Section 4 of the IT Act. However, there is no such provision to enable a surcharge to be so taxed, on the Finance Act prescribing an enhanced rate at the commencement of an year. The said contention however, cannot be sustained especially looking at the decision of the Hon'ble Supreme Court in CIT Kerala v. K Srinivas. [(1972) 4 SCC 526]. The facts are not relevant to the issue raised here and we need only look at the declaration as to the nature of a surcharge imposed in the Finance Act. The legislative history with respect to the concept of surcharge was traced by the Court, which, for the first time was found to have been recommended, in the report of the Committee on Indian Constitutional Reforms Volume I Part I. The word surcharge was used compendiously for the special addition to taxes on income imposed in September 1931. It was held so in paragraph 7 and 8

7. The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "Income tax" as employed in Section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of Article 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income tax and super tax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958 the language used showed that income tax which was to be charged was to be increased by a surcharge for the purpose of the Union. The word "surcharge" has thus been used to either increase the rates of income tax and super tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave no room for doubt that the term "Income Tax" as used in section 2 includes surcharge.

8. According to Article 271 notwithstanding anything in Article 269 and 270 Parliament may at any time increase any of the duties or taxes referred to in those Articles by a surcharge for the purpose of the Union and the whole proceeds of any such surcharge shall form part of the consolidated Fund of India. Article 270 provides for taxes levied and collected by the Union and distributed between

the union and these states. Caluse (1) says that tax on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the states in the manner provided in clause (2). Article 269 deals with taxes levied and collected by the Union but assigned to the States. The provisions of Articles 268 which is the First one under the heading distribution of revenue between the union and the states relate to duties levied by the Union but collected and appropriated by the states. Thus these Articles deal with the levy, collection and distribution of the proceeds of the taxes and duties mentioned therein between the Union and the state. The Legislative power of Parliament to levy taxes and duties is contained in Articles 245 and 246(1) read with the relevant entries in list I of the Seventh Schedule.

17. In the instant case surcharge was imposed by Finance Act, 2016 and the rate stood enhances by Finance Act 2017. The Income Tax even as per the Finance Act has to be at the rate specified in Part I of the 1st Schedule which shall be increased by surcharge for purposes of the Union. Surcharge hence partakes the character of Income tax and Article 271 itself empowers the Parliament, at any time to increase any of the duties or taxes by a surcharge for the purpose of the Union and it forms part of the consolidate fund. So when a surcharge is imposed it is in e4ffect an enhancement of the tax or duty. The provisions in the Finance Act also employs the words 'the income tax computed … shall be increased by a surcharge. Section 4 of the IT Act squarely applied to the surcharge imposed.

The judgement of the Learned Single judge is affirmed for the reasoning herein above and the writ appeal would stand dismissed without any order as to costs."

14. We are consciously aware of the judicial hierarchy and discipline according to which the Hon'ble High Court of Kerala, though non-jurisdictional, is higher than ITAT. Hence, respectfully following the aforesaid decision of Hon'ble Kerala High Court, we are inclined to hold that the higher rate of tax prescribed in section 115BBE is applicable to the whole previous year 2016-17 relevant to assessment-year 2017-18 and there is no merit in the contention raised by assessee.

15. In view of above discussions and for the reasons stated above, we are of the view that the Ld. PCIT has rightly termed the assessment-order as erroneous-cum-prejudicial to the interest of revenue and therefore the revision-order passed by Ld. PCIT is a valid order in terms of section 263. We are thus inclined to dismiss all grounds raised by assessee in present appeal. We order accordingly.

16. In the result, this appeal of assessee is dismissed.

Order pronounced as per Rule 34 of I.T.A.T. Rules 1963 on 23.12.2022.

Sd/- Sd/-

(SUCHITRA KAMBLE) (B.M. BIYANI)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Indore
दिनांक /Dated : 23.12.2022
Patel/Sr. PS

Copies to: *(1) The appellant*
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order
Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Benches, Indore

1.	Date of taking dictation	14.12.22
2.	Date of typing & draft order placed before the Dictating Member	14.12.22
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	14.12.22
4.	Date on which the approved draft is placed before other Member	19.12.22
5.	Date on which the fair order is placed before the Dictating Member for pronouncement	

6.	Date on which the file goes to the Bench Clerk	
7.	Date on which the file goes to the Head Clerk	
8.	Date on which the file goes to the Assistant Registrar for signature on the order	
9.	Date of dispatch of the Order	